# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 74-281

NICHOLAS VOWTERAS AND NESTOR VOWTERAS,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioners contend that they were entrapped as a matter of law and that they were denied due process and their Sixth Amendment right to counsel by the trial court's refusal to hold a hearing to determine the competency of petitioner Nestor Vowteras.

Following a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted of bribery, in violation of 18 U.S.C. 201(b), and conspiracy to bribe, in violation of 18 U.S.C. 371.[1] Each was sentenced to a year's imprisonment, with execution of

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[1]The indictment consisted of four counts, Count I alleged the conspiracy, and Counts II-IV alleged substantive bribery offenses. Petitioner Nicholas Vowteras was convicted on Counts I and IV and acquitted on Counts II and III. Petitioner Nestor Vowteras was convicted on all four counts. Co-defendant Murray Baron was acquitted on all counts.

all but two months of the sentence suspended, and each was placed on probation for the remainder of the sentence. The court of appeals affirmed (Pet. App. A; 500 F. 2d 1210).

The evidence at trial showed that in July 1972 Revenue Agent Kenneth Cooley was assigned the 1971 fiscal year tax return of the Argo Compressor Service Corporation ("Argo") for the purpose of conducting a routine corporate tax audit (Tr. 48).[2] Petitioners Nicholas Vowteras and Nestor Vowteras were, respectively, the President and Secretary-Treasurer of Argo. Each owned 46.5 percent of the corporate stock (Tr. 51). The tax return had been prepared by Argo's accountant, Murray Baron. Following notification to Argo by Cooley, an appointment was made for October 11, 1972, at which time Cooley was to begin the audit of Argo's books and records (Tr. 52, 53).

Cooley arrived at Argo on October 11, and, after meeting Baron and petitioners, began his audit (Tr. 61, 63-64, 78). After a routine morning of auditing, Cooley went to a local restaurant with Baron for lunch. As they were approaching the restaurant, Baron, referring to petitioners, said to Cooley: "These guys are probably going to make you some kind of a part time offer" (Tr. 84). He told Cooley that was the way "they work" and that Cooley should not be alarmed (Tr. 86). Cooley did not respond, and the two men had a general luncheon conversation (Tr. 86-88). However, after lunch Baron again raised the subject of a "part time offer" and asked Cooley if he would be interested. After answering in the negative, Cooley asked Baron what he meant by a part time offer, and Baron replied that "these guys would be glad to show their appre-

[2]"Tr." refers to the transcript of the district court proceedings.

ciation for any consideration [Cooley] could offer them in the area of travel and entertainment and commission expense" (Tr. 88-89). When asked what he meant by "appreciation," Baron told Cooley to wait until he saw figures (Tr. 90).

That afternoon Cooley continued the audit. At about four o'clock, Cooley was given a tour of the plant by Nicholas and Baron. During that tour Nicholas offered to give Cooley a portable air compressor. When Cooley refused, Baron advised Nicholas to take Cooley's address and send it to him. Cooley again refused (Tr. 92-95).

Cooley departed Argo that day with the understanding that he would return late in November to continue the audit (Tr. 99). When he returned home, he called the Assistant Regional Inspector for the Internal Revenue Service and reported the day's events. The next day, Cooley prepared an affidavit that detailed the pertinent conversations and events of the previous day (Tr. 101-103). Thereafter, every telephone and face to face conversation that Cooley had with petitioners and Baron was tape recorded (Tr. 107; Gov't. App. A-108).[3]

On November 29th, Cooley returned to Argo to continue his audit. Shortly before lunch, Cooley turned his attention to the "Commission Expenses" deduction of $63,396.69 (Tr. 116-118). In his examination of the books supporting the commission expense account, Cooley determined that about $59,000 worth of the deduction was represented by checks drawn to cash and endorsed by Nestor or Nicholas (Tr. 121-122, 158-162). It was explained to Cooley that the sum represented cash payments to purchasing agents who

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[3] "Gov't. App." refers to the appendix to the government's brief in the court of appeals, a copy of which has been lodged with this Court.

would not accept checks. Cooley characterized these payments as "kickbacks" (Tr. 124-126, 204). Cooley's request for a listing of purchasing agents to verify the expenditures was refused (Tr. 131-132).

After Cooley explained to Nicholas and Baron that if the payments were not verified they would lose their status as deductions and become dividends taxable to both Argo and the petitioners, Nicholas' and Baron's language became sprinkled with expressions such as, "whatever you can do for me, I'd really appreciate" and "I'd love to work anything out with you that I could, I don't care what it is" (see Transcribed Conversations Nos. 1, 1a, 1b, 1c, and 1d; Gov't. App. A-70, A-73, A-83, A-84, A-85).[4]

Throughout, Cooley neither rejected nor accepted the overtures of Baron and Nicholas but acted in accordance with the instructions he had received at training school and immediately after the October 11th meeting (Tr. 43-44, 114-115). The matter remained unresolved at the November 29th meeting.

Cooley's next audit was held on December 21. Present that day were Nestor and Baron. Nicholas, though present for about an hour in the morning, left Argo and was not present during any of the pertinent events and conversations of that day (Tr. 164). At that meeting, Cooley examined the "Promotional & Selling Expenses" deduction of $58,351.54 and found that a substantial portion of this deduction lacked supporting documentation (Tr. 165-166; 169-170).

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[4]Cooley's testimonial narrative of the transcribed conversations can be found at Tr. 146-162. The transcripts were admitted into evidence at Tr. 1401, 1403.

After lunch Baron gave Cooley a liquor carton containing five one hundred dollar bills (Tr. 214, 241-242). Thereafter Nestor promised an additional $14,500. He gave Cooley $4,500 more that day (Tr. 248-250; Transcribed Conversations Nos. 2-2d; Gov't. App. A-86—A-100), and future arrangements were made for the delivery of the remaining $10,000 (Transcribed Conversations Nos. 2c and 2d; Gov't. App. A-94—A-100).[5]

Cooley went to Argo for the last time on December 27. Nestor gave Cooley the remaining $10,000 (Tr. 261-266; Transcribed Conversations Nos. 3 and 3a; Gov't. App. A-101—A-103). Althought Nicholas was not present at the time the money changed hands, he subsequently entered the room and in the ensuing conversation indicated his knowledge and approval of the bribe (Transcribed Conversation No. 3b; Gov't. App. A-104—A-107).

Finally, bank records showed that on December 27, 1972, Nicholas Vowteras withdrew $10,000 from a personal savings account at the Atlantic Bank of New York (Government Exhibit 24c; Gov't. App. A-118; Tr. 280). Furthermore, on the same day Nestor Vowteras drew two checks, each for $5,000 on Argo's account at the same bank (Tr. 275; Government Exhibits 24A and 24B; Gov't. App. A-116, A-117; Tr. 280).

1. Petitioners' contention that they were entrapped as a matter of law is insubstantial. We note first that although the entrapment defense was raised at trial, the issue was not presented to the court of appeals. Petitioners' entrapment claim should not therefore be considered by this Court. See *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147, n. 2. In any event, the entrapment issue was submitted to the

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[5]Cooley's narrative of the transcribed conversations of December 21 can be found at Tr. 170-176, 213-255.

jury with proper instructions (Tr. 1360-1366), and, as shown above, the evidence established that it was petitioners, not any representative of the government, who initiated the bribery scheme. Agent Cooley did no more than provide petitioners with an opportunity to commit an offense that they were clearly predisposed to commit. *United States* v. *Russell*, 411 U.S. 423.

2. Petitioner Nestor Vowteras' claim that the trial court should have held a hearing to determine his competency to waive separate counsel is equally without merit.[6] As the court of appeals found (Pet. App. A, p. A4), the trial court "had no reasonable ground for believing [Nestor] was incompetent and was, therefore, under no obligation to hold a hearing. The observations of [Nestor] by the trial court, as well as [Nestor's] longstanding and successful contacts with his business, his family and the community, substantially undermine any possible inference that there was reasonable ground to invoke the procedures of 18 U.S.C. §4244." See, *e.g.*, *United States ex rel. Roth* v. *Zelker*, 455 F. 2d 1105 (C.A. 2), certiorari denied, 408 U.S. 927.

Moreover, the question of petitioners' joint representation was fully explored by the trial court, and petitioners and their counsel were given ample opportunity to insist on separate counsel. As the court of appeals found (Pet. App. A, pp. A2-A3):

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[6]To the extent that petitioners contend that the district court erred in denying their motion for a new trial on the ground of newly discovered evidence as to petitioner Nestor's alleged incompetency, their contention is unsound. The court of appeals found that the evidence that petitioners proffered in their new trial motion was not "newly discovered." As the court stated (Pet. App. A, p. A3): "* * * [Nestor's] exposure to psychiatric treatment over a period of many years was made known to defense counsel by the Government prior to trial. In fact the psychiatrist was interviewed by defense counsel shortly after the indictment was returned."

> The matter was carefully examined by the trial judge prior to trial on two separate occasions and both appellants as well as their attorney uniformly expressed their desire for joint representation by single counsel. Not *content* with their unequivocal statements on the record, the court conducted in camera proceedings with the same result. The defendants, as well as their attorney, were fully advised of the facts underlying the potential conflict and they cannot now repudiate their choice in the absence of a credible showing of "some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." * * *

Petitioners' joint representation was not prejudicial to their defense. Contrary to petitioner Nicholas' claim the joint representation did not prevent him from defending "on the merits." Petitioner Nicholas testified at trial as to both entrapment and his nonparticipation in the bribery, and he was in fact acquitted on two of the substantive counts. Petitioner Nestor's claim that joint representation prevented him from cross-examining Nicholas as to incriminating testimony is also groundless.[7] Nestor relied solely on the defense of entrapment, and due to the nature of the defense as well as the overwhelming tape recorded evidence, Nestor's commission of the offense charged was not in dispute.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

DECEMBER 1974.

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[7]The alleged incriminating testimony related to the payment of the bribes (Tr. 1131, 1194, 1210). As shown earlier, the fact that the payments were made was not in dispute. Moreover, taken in context, the alleged incriminating testimony was intended to support the entrapment claim. Thus, it is highly unlikely that petitioner Nestor would have cross-examined on this issue even if represented by separate counsel. Cf. *United States* v. *Foster*, 469 F. 2d 1, 4 (C.A. 1).